Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1423

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

THEODORE F. KOPFMAN, Appellant

v.

MARGIE D. KOPFMAN, Appellee

ON APPEAL FROM THE COURT OF APPEAL
OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

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(a)

QUESTIONS PRESENTED BY THE APPEAL

1. Whether the Uniformed Services Former Spouses Protection Act (10 U.S.C. Section 1408), by allowing California to characterize and divide military retired pay as community property, violates the due process clauses of the United States Constitution.

2. Whether the Uniformed Services Former Spouses Protection Act (10 U.S.C. Section 1408), if constitutionally neutral on its face, is unconstitutionally interpreted and applied by the California courts in violation of the due process clauses of the United States Constitution, and/or the contractual impairments clause of the United States Constitution.

3. Whether the California characterization and division of military retired pay, including V.A. disability benefits received in lieu of waived retired pay, as community property, violates the supremacy clause of the United States Constitution.

(b)

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(d)

ORDERS, JUDGMENTS AND OPINIONS DELIVERED IN THE COURTS BELOW

Interlocutory Judgment of Dissolution of Marriage (Appendix A). Final Judgment of Dissolution of Marriage (Appendix B). Tentative Decision of trial court (Appendix C). Judgment of trial court (Appendix D). The opinion of the Court of Appeal of the State of California, Fifth Appellate District (Appendix E). The California Supreme Court order denying review after judgment by the Court of Appeal (Appendix F).

None of the decisions of the courts below are officially reported.

(e)

GROUNDS ON WHICH JURISDICTION IS INVOKED

(i)

Nature of the Proceeding

Appellant has argued the following before

the California trial and appellate courts:

1. That the Uniformed Services Former Spouses Protection Act (USFSPA-10 U.S.C. Section 1408), by allowing California to characterize military retirement benefits as community property, is unconstitutional in that it deprives him of property without due process and without just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution;

2. That USFSPA, if constitutionally neutral on its face, is unconstitutional as applied by the California courts as a violation of the due process clauses and the impairment of contractual obligations clause; and

3. That the California characterization and division of military retired pay, including VA disability benefits received in lieu of waived retired pay, as community property, violates the supremacy clause of the United States Constitution.

The California courts have denied each argument, suggesting to appellant that he seek a "definitive ruling" from this court.

(ii)

Judgment Sought To Be Reviewed

The opinion of the California Court of Appeal for the Fifth Appellate District was filed August 26, 1988. Review was summarily denied without opinion by the California Supreme Court on November 9, 1988. Notice of Appeal to this court was filed in the California Court of Appeal for the Fifth Appellate District on December 9, 1988.

This appeal is being docketed within the ninety (90) days of the California Supreme Court's denial of the appellant's petition for review.

(iii)

Statutory and Case Authority Sustaining Jurisdiction

This court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(2), (3), and this court's decisions in United States v. Tyler, 105 U.S. 244 (1881); Wissner v. Wissner, 338 U.S. 655 (1950); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); McCarty v. McCarty, 453 U.S. 210 (1981); Ridgway v. Ridgway, 454 U.S. 46 (1981); and Rose v. Rose, 481 U.S. 619 (1988).

Additionally, some, but not all, of the issues raised herein are presently before this court in the case of Gerald E. Mansell v. Gaye M. (Mansell) Forbes Case No. 87-201, also on appeal from the California Court of Appeal, Fifth Appellate District.

(f)

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED HEREIN

This case involves the interpretation and

application of Article I, Section 10 of the United States Constitution, which states in relevant part:

> "No State shall . . . pass any . . . laws impairing the obligation of contracts . . ."

This case involves the interpretation and application of the Fifth Amendment of the United States Constitution, which states in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This case involves the interpretation and application of the Fourteenth Amendment of the United States Constitution, which states in relevant part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

This case involves interpretation of the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408, which is set forth in full in Appendix G because of its length. In particular, the case involves Section 1408(c)(1)

and Section 1408(a)(4) (as originally enacted) and Section 1408(a)(4)(E) (as presently worded).

Section 1408(c)(1) states as follows:

> "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

Section 1408(a)(4) stated as follows:

> "'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under Chapter 61 of this title) less amounts which-. . ."

Section 1408(a)(4)(E) states as follows:

> "'Disposable retired or retainer pay' which means the total monthly retired or retainer pay to which a member is entitled less amounts which-
> (E) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on

the temporary disability retired list). . ."

This case also involves certain regulations found within the Code of Federal Regulations at 32 CFR Section 63 in which the Department of Defense, in response to USFSPA, was faced with the task of implementing its provisions. Those regulations, titled Former Spouse Payment From Retired Pay, provide insight into the purposes of USFSPA, and are set out in full in Appendix H.

28 U.S.C. Section 2403(e) may also be applicable in that the constitutionality of an act of Congress is challenged herein. Therefore, this statement is being served on the Solicitor General.

(g)

STATEMENT OF THE CASE

Appellant's period of continuous U.S. Naval Service prior to marriage was from February 19,

1951 through September 19, 1953. The parties were married September 19, 1953. Appellant retired as a captain from the United States Navy effective November 1, 1978. On or about September 25, 1980, appellant requested the Board for Correction of Naval Records to change his naval records to indicate he was retired effective November 1, 1978 by reason of physical disability. He had received certain injuries, resulting in subsequent disabilities, while a prisoner of war for seven years in North Vietnam. On or about March 19, 1985, the Secretary of the Navy changed appellant's records to reflect that he was placed on a temporary disability retired list effective November 1, 1978 by reason of his unfitness because of a physical disability rateable at 20%, and that he was placed on the retired list by reason of permanent physical disability rateable at 80% effective November 1, 1980. Appellant was retired pursuant to 10 U.S.C. Section 1210, Chapter 61,

as a naval captain. The parties separated July 25, 1979.

The marriage of the parties was dissolved by interlocutory judgment of dissolution entered on or about November 5, 1981. The final judgment of dissolution was entered the following day. Neither judgment specifically mentioned appellant's military retirement pay benefits.

On or about August 25, 1983, nearly two years after the divorce, appellee filed a complaint in the Fresno County, California Superior Court seeking an alleged community property interest in appellant's military retirement benefits. She alleged that the military retirement benefits had not been characterized and/or divided by the court at the time of their divorce and that, therefore, the military retirement benefits were a "missed asset" which should be characterized and divided as community property, relying on the California Supreme Court decision in Henn v. Henn (1980) 26 Cal.3d 323. She sought

characterization and division pursuant to the recently enacted USFSPA. (In Henn, the court held that if a community property asset was not divided by judicial decree or any agreement between the parties, the asset could be subsequently divided as a "missed asset".)

At the subsequent trial of this matter, appellee agreed that the parties had entered into an oral agreement at the court ordered settlement conference in their marital dissolution proceeding; that that agreement disposed of appellant's military retirement pay benefits; and that pursuant to the agreement, the parties agreed to be bound by this court's decision in McCarty.

Therefore, pursuant to this court's decision in McCarty and the parties' specific agreement to be bound by McCarty, appellant treated his military retirement benefits as his separate property under California law and appellee claimed no interest in those benefits. (The parties also agreed that if the McCarty decision were

favorable to the wife's position, i.e., upholding California's community property treatment of those benefits, then the parties would renegotiate their marital property settlement agreement.)

On or about July 30, 1986, the matter was submitted to the trial court. The trial court impliedly rejected appellant's arguments regarding the unconstitutionality of USFSPA by not discussing those arguments in its decision. The trial court also rejected appellant's contention that California's interpretation of USFSPA violated the federal Supremacy Clause. The court's rejection was founded on two (2) California Supreme Court decisions, Aloy v. Mash (1985) 38 Cal.3d 413, 421-422 and Casas v. Thompson (1986) 42 Cal.3d 131 and two (2) lower appellate decisions, In re Marriage of Stenquist (Stenquist II) (1983) 145 Cal.App.3d 430 and In re Marriage of Mastropaolo (1985) 166 Cal.App.3d 953.

Those four (4) cases generally stand for the following principles:

a) that USFSPA totally abrogated McCarty;

b) that McCarty disappeared prospectively, presently, and retroactively;

c) that USFSPA is a mere garnishment statute with no substantive effect on California community property law;

d) that it was proper to divide appellant's gross military retired pay regardless of the language of Section 1408(a)(4) and Section 1408(c)(1);

e) that there is now no federal limitation on the state characterization or division of military retired pay;

f) that appellant's military retired pay is deferred compensation for past services, and therefore community property - not reduced current compensation for reduced current services (U.S. v. Tyler, 105 U.S. 244 (1881), and therefore separate property;

g) that the word "treat" as used in

USFSPA (Section 1408(c)(1)) is not synonymous with the word "characterize" for community property purposes; and

h) that USFSPA does not preclude California's characterization and division of that portion of appellant's military disability retired pay which is received in lieu of waived military retired pay.

Therefore, the trial court characterized as community property and divided appellant's military retired pay, including that portion of his disability pay received in lieu of waived retired pay. (The trial court found that the parties had in fact entered into an agreement to divide the military retirement benefits pursuant to McCarty. However, based on what appeared to be a misinterpretation of the decision in In re Marriage of Doud (1986) 181 Cal.App.3d 510, the trial court found the agreement to be ineffective.)

The California Court of Appeal for the Fifth Appellate District found that "despite any

misinterpretation of Doud, the trial court's construction of the agreement is supported by this court's opinion in In re Marriage of Stephens (1986) 184 Cal.App.3d 616." The Stephens court held that despite a specific agreement to be bound by the McCarty decision, the parties did not really mean what they said. Instead, the court rationalized that the parties really intended to be bound by the ultimate resolution of the so-called McCarty "issue".

The appellate court applied the Stephens rationale to this case, despite the nonexistence of any facts to suggest that appellant and appellee agreed to anything more than to be bound by this court's decision in McCarty.

The appellate court also relied on two California Supreme Court decisions [Casas, supra; and In re Marriage of Barnes (1987) 43 Cal.3d 1371] to reject appellant's argument regarding federal supremacy, due process, and contractual impairment. The appellate court reiterated the

Casas holding in regards to the nonexistence of federal supremacy as discussed, supra.

It then rejected appellant's argument in regards to the due process and contractual obligations clauses in light of the California Supreme Court's decision in Barnes. However, the constitutionality of USFSPA was not directly challenged in Barnes. The constitutional challenge was to California Civil Code Section 5124, which allowed the application of USFSPA to those judgments or orders entered in the so-called "window" between McCarty (June 26, 1981) and the effective date of USFSPA (February 1, 1983). The Barnes' court held that Section 5124 was neither unconstitutional as a violation of due process nor as a violation of constitutional prohibitions against impairment of contracts. The lower appellate court herein found that California Civil Code Section 5124 was constitutional by virtue of the "implied constitutionality" of USFSPA.

Appellant's petition for review by the California Supreme Court was summarily denied on November 9, 1988. No opinion was issued by that court. Therefore, the opinion of the Court of Appeal of the State of California, Fifth Appellate District, reflects the most recent definitive adjudication in this matter.

(h)

THE UNCONSTITUTIONAL TREATMENT OF MILITARY RETIRED PAY REQUIRES REVIEW BY THIS COURT

A naval officer's entitlement to retired pay is dependent upon statutory right. Bell v. United States, 366 U.S. 393, 401 (1961). Therefore, the rights of the affected service member must be determined by reference to the statutes and the regulations implementing those statutes. United States v. Larionoff, 431 U.S. 864 (1977). In construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight, unless it is

plainly erroneous or inconsistent with the regulation. Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945); INS v. Stanisic, 395 U.S. 62 (1969).

It is settled that Congress may prospectively reduce the pay of members of the armed services, even if that reduction deprives the members of benefits they had expected to be able to earn. United States v. Dickerson, 310 U.S. 551 (1940). That is justified on the grounds that military pay is not property [Costello v. United States, 587 F.2d 424 (1978) cert. denied, 442 U.S. 929 (1979)]; that military pay is a statutory right, not a contractual right [Bell, supra; Abbott v. United States, 200 Ct.Cl. 384 (1973)]; and that the service member acquires no vested right to pay benefits [Costello, supra]. However, for Congress to intend to deprive a service member of pay due for services already performed, but still owing, presents a constitutional challenge. United States v. Larionoff, 431 U.S. 864 (1977).

Military retired pay benefits, even though not property, are still statutorily created "property" interests protected by the Fifth Amendment. Mathews v. Eldridge, 424 U.S. 319, 332 (1975) (social security benefits). The Fourteenth Amendment's protection of property also extends to statutory entitlements. Fuentes v. Shevin, 407 U.S. 67 (1972). Additionally, Congress remains subject to the due process clauses when acting in the area of military affairs. Rostters v. Goldberg, 453 U.S. 57 (1981).

This court has clearly determined that military retired pay is not property. However, Congress, in enacting USFSPA, has stated in Section 1408(c)(1) that at least a defined portion of that pay (disposable retired or retainer pay) may be treated by state courts "either as property solely of the member or as property of the member and his spouse . . . " (Emphasis added.)

If Congress intended to characterize military retired pay as property, and then allow the states to take it from the service member and give it to the member's former spouse, without just compensation, then Congress has violated the due process clauses of the United States Constitution. (Some cases have concluded that Congress, in enacting USFSPA, intended to recognize the contributions and sacrifices of the military spouse. Those contributions and sacrifices have helped create and maintain an effective military force. Therefore, USFSPA, by allowing military retired pay to be paid the former spouse, benefits the military and constitutes a public use.) The Costello court, after noting this court's decision in Larionoff, stated that it would proceed on the assumption that if military retirement pay had been fully earned at the date of retirement, it could not be divested without compensation. Costello, supra, 587 F.2d at 427, fn.2.

Alternatively, if Congress did not intend to abrogate the prior "property" decisions of this court, but merely intended to allow the state courts to make the determination as to whether the military retired pay is property, then the California interpretation conflicts with federal decisions and violates the due process clauses.

The meaning of property as used in the due process clauses is normally a federal question. United States v. Causby, 328 U.S. 286 (1946). The issue of what is a taking is a federal question governed by federal law. Johnson v. United States, 479 F.2d 1383 (1973).

Under federal case authority, military retired pay is reduced current compensation for reduced current services. United States v. Tyler, 105 U.S. 244 (1881); Costello, supra. Under the conflicting California case authority, military retired pay is deferred compensation for past services. In re Marriage of Fithian (1974) 10 Cal.3d 592; Casas v. Thompson (1986) 42 Cal.3d

131. If USFSPA did not affect the federal view of military retired pay, then, under California law, military retirement pay, as current earnings after separation, is separate property. California Civil Code Section 5118.

Such a reading would render USFSPA constitutional and would leave USFSPA as a garnishment statute, as found by the California Supreme Court in Casas, supra, albeit for different reasons. Even if USFSPA is merely a garnishment statute, this court has emphasized that due process considerations apply when the government acts jointly with a creditor in securing disputed property. Lugar v. Edmonson Oil, 457 U.S. 922 (1982); Northern Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

However, if it were the intent of Congress to remove these issues from federal interpretation, then the "fair play" considerations

of the due process clauses [Galvan v. Press, 347 U.S. 522 (1954)] have been grossly violated. Under federal law the "retired" service member is subject to the following enactments:

a) a retired regular officer remains a member of the regular service (10 U.S.C. Section 3504(a), Section 8504(a);

b) a retired reserve officer is subject to recall without consent at any time (10 U.S.C. Section 6722);

c) a retired military member is subject to the Uniform Code of Military Justice (10 U.S.C. Section 802, Section 804);

d) a retired officer may be dropped from the retired roll for a civil conviction and sentence exceeding three months (34 U.S.C. Section 1200);

e) a retired officer may be recalled to active duty and then dismissed, the equivalent to an enlisted man's dishonorable discharge (Hooper v. United States, 326 F.2d 982 (Ct.Cl., 1964),

cert. denied, 377 U.S. 977 (1964));

f) retired officers are subject to pay reductions if they receive certain other employment (5 U.S.C. Section 5532);

g) complete forfeiture of pay is required upon conviction of certain crimes (5 U.S.C. Section 8312);

h) employment in defense work for private firms is precluded for three (3) years after retirement (37 U.S.C. Section 801);

i) employment by any foreign citizenship is forbidden (U.S. Const., Art. I, Section 9, Cl. 8);

j) pay is forfeited if foreign citizenship is acquired (37 Comp.Jen. 207 (Navy)); and

k) a retired regular officer may not represent one who sells property to the government branch in which he/she holds retired status (Public Law 87-849, Section 2, 76 Stat. 1126).

"Fair play" was violated in this case when appellant served his country for twenty-seven (27) years, including seven (7) years as a prisoner of war, under federal statutory and case law guidelines which defined his retired pay as separate property, only to have Congress change the rules after appellant's retirement due to service-connected disability, divesting him of benefits with no just compensation. Appellant not only lost benefits, but he remains subject to the strict rules, regulations and restrictions mentioned above.

This case also involves veterans disability benefits. Appellant receives VA disability benefits to the extent that he waives a corresponding amount of his military retired pay. 38 U.S.C. Section 3104(a)(1), Section 3105.

USFSPA protects those disability benefits by specifically omitting those benefits from its definition of disposable retired or retainer pay. 10 U.S.C. Section 1408(a)(4); 32 C.F.R. Section

63.

California pays lip service to the purpose of veterans disability benefits by recognizing that such benefits are intended to compensate the disabled veteran and, therefore, are his separate property. In re Marriage of Stenquist (1978) 21 Cal.3d 779. However, the California courts view the military members' unilateral election of disability benefits in lieu of retired pay as an attempt to defeat the alleged community interest in the military retired pay waived in order to receive the tax free disability benefits. Stenquist, supra.

Therefore, the California courts hold that only the net amount of disability benefits received over and above what would have been received as military retired pay constitutes separate property. The disability monies received in lieu of military retired pay remains community property subject to division on divorce.

As a result, the overwhelming majority of

appellant's disability benefits have been divided as community property. The California Supreme Court has ignored the plain language of USFSPA precluding such a characterization and division by holding that when Congress states in Section 1408(c)(1) that the states may "treat" the benefits defined in Section 1408(a)(4) (thereby implying only a limited waiver of federal preemption after McCarty), that Congress did not mean "treat" to be synonymous with "characterize"; and that USFSPA was merely a garnishment, or procedural, statute with no substantive effect on California community property law.

California's treatment of VA disability benefits also conflicts with this court's interpretation of 38 U.S.C. Section 3101 in Rose. This court held in Rose that VA disability benefits were subject to attachment to comply with state spousal and child support orders. However, the court noted that attachment of VA

disability benefits to satisfy the amoral businesslike concerns of a property division were a different matter. Finally, California's characterization and division of military retired pay waived in order to receive VA disability benefits is also analogous to the set offs precluded by this court in Wissner.

CONCLUSION

Appellant THEODORE F. KOPFMAN, Captain, U.S. Navy (Ret.), respectfully submits that his challenges to the constitutionality, interpretation and/or application of the Uniformed Services Former Spouses Protection Act are serious and meritorious, justifying this court's noting of probable jurisdiction.

DATED: February 14, 1989

DAVID J. ST. LOUIS, INC.

BY: Charles A. Wieland
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APPENDIX A

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FILED
November 6, 1981
Fresno County Clerk

Attorney for Margie D. Kopfman

IN THE SUPERIOR COURT OF

THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

MARGIE D. KOPFMAN,	Case No. 245469-2
Petitioner,	INTERLOCUTORY JUDGMENT OF
v.	DISSOLUTION OF MARRIAGE
THEODORE F. KOPFMAN,	(STIPULATED)
Respondent.	

1. This proceeding came on for default or uncontested hearing on August 28, 1981 in

Department 6 before The Honorable John Fitch. Petitioner present in court. Attorney for petitioner, Grant N. Mitchell, present in court. Respondent present in court. Attorney for respondent, David J. St. Louis, present in court.

2. The court acquired jurisdiction of the respondent on October 13, 1979. Respondent was served with process.

3. THE COURT ORDERS

a. An interlocutory judgment be entered and the parties are entitled to have their marriage dissolved.

b. After six months from the date the court acquired jurisdiction of the respondent a final judgment of dissolution may be entered upon proper application of either party or on the court's own motion, unless a dismissal signed by both parties is filed. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall

not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

c. Jurisdiction is reserved to make such other and further orders as may be necessary to carry out the provisions of this judgment.

4. THE COURT FURTHER ORDERS

SPOUSAL SUPPORT:

The Husband shall pay to the Wife the sum of $850.00 by September 5, 1981, as and for spousal support. Thereafter, the Husband shall pay to the Wife the sum of $750.00 per month as and for spousal support. Said monthly payments to commence on October 5, 1981 and continuing on the 5th of each and every month until further order of the Court. Each party herein shall have the right to move once for a modification of this Spousal Support Order without a showing of changed circumstances until September 30, 1982.

CHILD CUSTODY AND SUPPORT

There are no longer any minor children of this marriage and therefore there are no longer any issues as to child custody and support.

ATTORNEY FEES AND COURT COSTS

The Husband shall pay to Walton & Mitchell, 815 "N" Street, Sanger, California 93657, the sum of $500.00 by December 15, 1981, as and for their attorneys fees and costs incurred on behalf of the Wife. With the above exception, each party herein shall pay his/her respective attorney's fees and court costs.

PROPERTY DIVISION

The parties hereto stipulate that the division of community property herein is a substantially equal division but that any agreements between them as to the values of specific assets were and are made so as to avoid the expense and inconvenience of litigation and are not binding upon them as to any transactions with third parties who are not parties to this proceeding.

The Wife is to receive: The family residence located on the corner of Sparrow and Redwood, Shaver Lake, California, APN 120-245-13, it being understood that the Wife intends to sell said property and the Husband has procured a buyer who will purchase the residence under the following conditions: Pay to the Wife the sum of $1,000.00 per month commencing in September, 1981, and continuing through December, 1981, and pay the Wife the sum of $56,000.00 via a cashier's check by January 31, 1982, and assume loans of approximately $47,275.00 secured by said residence; the community interest in Pend-Oreille Properties, Ltd. including real property located in the State of Oregon and owned by Pend Oreille Properties, Ltd.; the personal property, furnishings, equipment and appliances currently in her possession except as stated below; the following property currently in the possession of the Husband: Two bread racks, green leaded glass lampshade, green ceramic Christmas tree,

orange ceramic pumpkins, red Lang ski boots, blue stem glasses, cherrywood dropleaf table, brown bicycle, Christmas ornaments.

The Husband shall receive: The community interest in the business known as Shaver Lake Pizza Parlor located in Shaver Lake, California, including any real property owned by said business; a promissory note to the community estate from the business known as Shaver Lake Pizza Parlor in an approximate amount of $9,004.00; the personal property, furnishings, equipment and appliances currently in his possession except as stated above; his grandmother's hand-painted plates currently in the possession of the Wife. Further, the Husband is to assume responsibility and hold the Wife harmless for the community debts of approximately $2,500.00.

Each party shall execute forthwith any and all documents necessary to carry out the terms of this order.

WAIVERS

Findings of fact, conclusions of law, notice of time of trial, notice of entry of judgment, right to move for a new trial, and right to appeal are waived by the partes hereto, who consent to the immediate entrance of the final decree.

APPROVED AS TO CONTENT & FORM

MARGIE D. KOPFMAN
Petitioner/Wife

APPROVED AS TO CONTENT & FORM

SANDELL, YOUNG & ST. LOUIS
By DAVID J. ST. LOUIS
Attorneys for Respondent/Husband

DATED: _____.

Hollis G. Best
JUDGE OF THE SUPERIOR COURT

APPENDIX B

Law Office of
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(209) 445-1500

FILED
November 6, 1981
Fresno County Clerk

Attorney for Respondent

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

MARGIE D. KOPFMAN, Petitioner, v. THEODORE F. KOPFMAN, Respondent.	Case No. 245469-2 FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

1. The court acquired jurisdiction of the respondent on October 13, 1979.

2. THE COURT ORDERS

a. A final judgment of dissolution be entered, and the parties are restored to the status of unmarried persons.

3. THE COURT FURTHER ORDERS

a. That the provisions of the Interlocutory Judgment which was entered November 5, 1981, be made binding on both parties as though set forth herein in full.

DATED: November 6, 1981

HOLLIS G. BEST
Judge of the Superior Court

APPENDIX C

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

MARGIE D. KOPFMAN,	)	Case No. 245469-2
	)	Dept. 6
Petitioner,	)	
	)	
v.	)	TENTATIVE DECISION
	)	(C.C.P. §632, Cal.
THEODORE F. KOPFMAN,	)	Rule of Court 232)
	)	
Respondent.	)	
	)	

The above entitled matter came on regularly for trial on July 30, 1986. Kenneth W. DeVaney and Dennis A. Cornell appeared on behalf of plaintiff; David St. Louis and Charles A. Wieland appeared on behalf of defendant. Counsel and the parties stipulated that the Court's decision should be based on the attached "Statement of Stipulated Facts and Issue." The Court having carefully considered same, now finds and rules as

follows:

I

Until In re Marriage of Fithian (1974) 10 Cal.3d 592, the California view regarding characterization of vested military retirement pensions as community or separate property was unsettled. In Fithian, the California Supreme Court held vested military pensions are community property. However, on June 25, 1981, in McCarty v. McCarty (1981) 453 U.S. 210, the United States Supreme Court held the Federal legislative scheme authorizing military pensions impliedly preempted state community property law and prohibited the division of military retirement pay. In response to McCarty, Congress enacted the Federal Uniform Services Former Spouse's Protection Act (hereinafter referred to as "FUSFSPA"), U.S.C. §1408, to Title 10 of the United States Code, and made its provisions retroactive to the day before that decision was filed.

FUSFSPA was not specifically made retroactive to apply to dissolution decrees that became final during the "window of time" period between the time McCarty was decided (June 25, 1981) and the date FUSFSPA became effective (February 1, 1983). Thus, we have the instant case, where the Final Judgment of Dissolution was entered on November 6, 1981.

It should first be noted that the California legislature immediately enacted Civil Code §5124 to make FUSFSPA applicable to the "window" so that "[t]he parties therein would receive the same treatment given to similarly situated parties whose dissolution became final before McCarty or after the corrective federal law." (See Assem. Com. Rep. on Judiciary, Sen. Bill No. 1034 (1983) p. 3.) Under Civil Code §5124, modification of a community property settlement, judgment or decree was permitted to include a division of military retirement benefits. However, defendant contends that since Civil Code §5124 was repealed

effective January 1, 1986, this section is unapplicable to this action because the action was filed on August 25, 1983, prior to the effective date of the section, and plaintiff has failed to amend her action to bring it within the provisions of a section that no longer exists.

This argument is not persuasive for a number of reasons. First of all, nothing in Civil Code §5124 indicates that it is the exclusive remedy for divisions of military retirement benefits. Rather, it was implemented for the very purpose of allowing those spouses who obtained final orders during the "window" period to modify those judgments or decrees to conform to state law pursuant to FUSFSPA. Furthermore, the legislature was aware of Henn v. Henn (1980) 26 Cal.3d 323, and did not preclude such actions where a Civil Code §5124 might also provide relief.

Further, our California Supreme Court in Aloy v. Mash (1985) 38 Cal.3d 413 noted:

"Starting with the last paragraph of the McCarty opinion itself, the judicial and legislative branches, state and federal, cooperated in a massive and largely successful drive to make McCarty disappear--prospectively, presently and retroactively .... The result is that, for most purposes, McCarty not only is not the law but never really was." Pp. 421-422.

It is thus apparent that Civil Code §5124 was merely one of several vehicles used to correct potential McCarty inequities, and more importantly, to arrive to pre-McCarty status.

The more recent California court decision of Casas v. Thompson (July, 1986) 42 Cal.3d 131 provides much illumination on the issues in contention. In Casas, the former wife of a retired naval officer brought an action for partition of his military retirement pay, the rights to which had not been adjudicated at the time of the divorce. The court held that McCarty had had prospective applications only, and that

retroactive application of the act did not violate the principle of separation of powers as a legislative attempt to annul the decision. The court notes the following legislative history surrounding the enactment FUSFSPA:

"Senate Report No. 97-502 expressly details the legislative intent and purpose underlying FUSFSPA. For instance, its stated primary purpose' is to remove the effect of the United States Supreme Court decision in McCarty v. McCarty, 453 U.S. 210 [, supra,] ... by permitting ... courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation....' (Sen. Rep. No. 97-502, supra, p. 1; 1982 U.S. Code Cong. & Admin. News, p. 1596.)

"Any doubt as to the intended scope of the foregoing sweeping language is dispelled at page 5 of the report; 1982 United States Code

Congressional and Administration News, page 1599: '[T]he committee intends the legislation to restore the law to what it was when the courts were permitted to apply state divorce laws to military retired pay." (Italics added.) Thus, it is clear FUSFSPA's primary purpose is to remove obstacles the state courts may encounter in applying their divorce laws to military retired pay as those laws were being applied before the decision in McCarty v. McCarty, and as if that decision never existed. Pre-McCarty California decisions treated military retirement benefitxs like all other community property, dividing the total (gross) benefits.[10] (See In re Marriage of Fithian, supra, 10 Cal.3d at pp. 595, 604.)

"Not only does the legislative history of FUSFSPA document Congress's understanding that state laws characterizing military pensions as community property would apply in the same way as they did before McCarty, but even the McCarty analysis, applied after the enactment of

FUSFSPA, would yield the conclusion there was no longer any implicit conflict between state laws and the federal scheme."

Footnote 10 in Casas is also enlightening, and states as follows:

"[10]In a post-McCarty decision, [the Court of Appeal] rejected the identical argument Max pursues, finding the divisible community property interest is in the total military retirement benefits earned during the course of the marriage, and not in a reduced sum derived by treating the disposable retired pay as the only part which may be treated as a community property asset. Although [the] treatment of this issue in In re Marriage of Scott (1984) 156 Cal.App.3d 251, was recognizably summary, an alternative result is inconsistent with the express congressional intent to restore the state court's ability to apply the law to military retired pay as it was applied pre-McCarty." (Emphasis noted.)

It should also be noted that although

defendant contends that the issue of retroactivity was not before the court in Casas and partially cites footnote 4 as authority, a complete reading of that footnote, a set forth below, lends further support to what seems self-evident, i.e., that FUSFSPA is in fact retroactive and conclusively abrogates McCarty:

"[4]Max also argues that FUSFSPA, effective February 1, 1983, cannot be constitutionally applied to cases (his 1966) divorce) decided before its effective date. He contends to retroactively apply FUSFSPA violates the principle of separation of powers as a legislative attempt to annul McCarty. Max misconceives the nature of Virginia's action here. The pension was not before the court in 1966; Virginia's interest was not altered by that decree. This is an independent action to divide an omitted asset; Virginia does not and cannot sek to modify or reopen the 1966 judgment. (In re Marriage of Cobb, 68 Cal.App.3d 855, 860, fn.1.) In any

event, as we shall explain, Virginia's partition action requires an application of FUSFSPA only to the extent FUSFSPA expressly or impliedly preempts California community property laws, which it does only to a limited extent not relevant to the issues posed by this case." (Emphasis added.)

II

In the pre-McCarty age, Henn v. Henn, supra, was the ultimate authority in this area. In the Henn case, the parties had married in 1945, and the petition for dissolution was filed 25 years later, with an interlocutory granted on February 22, 1971, and final judgment entered on May 19, 1971. Neither the pleadings nor the judgment made mention of the fully matured federal military retirement pension that Henry was receiving at the time of interlocutory decree. Pension had been partially earned during the marriage and its existence was known to Helen at the time of dissolution proceedings.

"Under California law, a spouse's entitlement to a share of the community property arises at the time that the property is acquired." (Civil Code §§5107, 5108, 5110.) That interest is not altered except by judicial decree or an agreement between the parties. Hence, "under settled principles of California community property law, 'property which is not mentioned in the pleadings as community property is left unadjudicated by decree of divorce, and is subject to future litigation, the parties being tenants in common meanwhile.'"

"Helen's interest in Henry's military pension arose independent of and predates the original decree of dissolution and property settlement. This interest was separate and distinct from her interest in the items of community property which were divided at the time of the dissolution. Since it is conceded that the issue of Henry's military pension was not before the court which issued the final decree, the judgment of that court cannot be

said to have extinguished Helen's putative interest in that asset." (Henn, p. 330.)

Thus, petitioner does have a divisible interest in an omitted asset under Henn. The question then arises whether the parties agreed to rely on McCarty as to the disposition of the military benefits, and if so, whether such agreement removes this case from Henn consideration.

Plaintiff testified at her April 30, 1984 deposition that the terms of the interlocutory judgment were agreed upon by the parties at the time of the settlement conference, and they further agreed that if McCarty were against her interests, the parties would go ahead with what was agreed upon (page 18, lines 17-page 19, line 5). The recent appellate decision in In re Marriage of Doud (1986) 181 Cal.App.3d 510 is helpful in resolving this issue. In Doud, the parties stipulated on June 2, 1981 to a judgment dividing their claimed and disputed marital

property but reserving a resolution of the status of the military pension pending a decision in McCarty. The provision at issue stated that the court "specifically reserves jurisdiction over the division of the non-vested United States Air Force Retirement benefits" pending McCarty "... and in the event that the court decides that military retirement pay is not divisible as a community property asset by California courts, there shall be a determination that there is no community interest" in the retirement benefits.

This judgment was entered on August 18, 1981. No appeal was taken from it.

On March 20, 1984, the former wife, relying on Civil Code §5124, moved to modify the judgment to divide the pension as marital property. The appellate court affirmed the trial court's decision granting the motions and modification of judgment, and rejected appellant's contention that by virtue of the agreement, respondent had renounced all rights in the

military pension. The court stated:

> "Perceiving that definitive United States Supreme Court resolution of the status of Robert's penion was in the offing, Robert and Betty stipulated to forego a local and possible ephemeral decision. They agreed to be bound by the governing law. Had they done nothing, that would have been the result in any case. The agreement does not show the parties anticipated FUSFSPA and section 5124 .... The agreement cannot be real as a renunciation of rights not in being. There is no basis to conclude that the agreement was intended to allocate or compromise the risk of subsequent legislation undoing McCarty. (P. 519)

Similarly, in the case at bar, the agreement reached by the parties cannot be read to do any less than the more express renunciation set forth in Doud.

III

The next issue presented for review is whether FUSFSPA precludes the State of California from characterizing and dividing military disability benefits as community property. The California Supreme Court in In re Marriage of Stenquist (1978) 21 Cal.3d 779, determined that

to permit a spouse, by unilateral election to receive a military disability pension instead of a retirement pension, would allow the spouse to transmute community property into separate property, and thereby negate the protective philosophy of the community property law of California. In Stenquist II (1983) 145 Cal.App.3d 430, the court held that the above award did not violate the supremacy clause of the United States Constitution since McCarty did not purport to deal with disability retirement, and FUSFSPA failed to address whether disability retirement pay could or could not be treated by state courts as property of the member or as community property. Also, in In re Marriage of Mastropaolo (1985) 166 Cal.App.3d 953, the court cited Stenquist II, supra, and In re Marriage of Cullen (1983) 145 Cal.App.3d 424 which had rejected the claims of a husband who asserted that by expressly excluding payments due under military disability retirement pensions from the definition

of "disposable retired or retainer pay," as defined in FUSFSPA at §1408(a)(4), Congress had expressed an intent to preempt state law and disallow disposition of military retirement pay by state courts in accordance with state law. The Mastropaolo court then held that federal law did not prohibit the granting of a community property interest to a former wife in the part of her former husband's military disability benefits that would have been paid to him as longevity retirement benefits, where he could have elected to receive such benefits rather than disability benefits. The case at bar is no different.

IV

Having concluded that plaintiff has a community property interest in the gross military disability that would have been paid to defendant as longevity retirement benefits, the focus now shifts to whether such award should be given full retroactive effect. Under the circumstances of the present case, as reflected by the record

provided to the Court, it would appear inequitable to force defendant to compensate plaintiff for her past community share after he has paid $750.00 monthly spousal support payments per the stipulated interlocutory judgment of dissolution of marriage.

It was the Court's understanding that counsel would adjust the figures to correspond to the Court's findings, and that the Court need not concern itself with this matter. If the Court is mistaken on this matter, however, it will proceed with that process and/or allow counsel an appointment to be heard further on the matter.

Otherwise, if timely request is made, plaintiff shall prepare a proposed statement of decision and judgment in accordance with the terms of this tentative decision. If no such request is made, the tentative decision will become the statement of decision.

DATED this 24th day of October, 1986.

MARIO G. OLMOS
Judge of the Superior Court

APPENDIX D

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FILED
January 16, 1987
Fresno County Clerk
By L. Prosser Deputy

Attorney for Defendant THEODORE KOPFMAN

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

MARGIE D. KOPFMAN, Petitioner, v. THEODORE F. KOPFMAN, Respondent.	Case No. 300178-1 JUDGMENT AFTER TRIAL BY COURT (STIPULATED)

The above-entitled matter came on regularly

for trial on July 30, 1986, Honorable Mario Olmos, presiding. Kenneth W. DeVaney and Dennis Cornell appeared on behalf of Plaintiff; Charles A. Wieland appeared on behalf of Defendant. Counsel and the parties stipulated that the court's decision should be based on a submitted "Statement of Stipulated Facts and Issue".

On or about October 24, 1986, the court rendered a Tentative Decision.

Plaintiff has not submitted a proposed statement of decision and judgment in accordance with the terms of the Tentative Decision.

THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED, that the Tentative Decision is the statement of decision in this matter. Accordingly, it is the judgment of this court that Plaintiff has a community property interest in the gross military disability that would have been paid to Defendant as longevity retirement benefits. However, Defendant is entitled to a set-off/credit against that award for monies he

has paid to Plaintiff as spousal support pursuant to the stipulated interlocutory judgment of dissolution of marriage.

DATED: January 15, 1987

Mario Olmos
Judge of the Superior Court

APPENDIX E

Court of Appeal
Fifth Appellate
District
FILED
August 26, 1988
Kevin A. Swanson,
Clerk

NOT TO BE PUBLISHED
IN OFFICAL REPORTS

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of MARGIE and THEODORE F. KOPFMAN.	)	F008411
MARGIE D. KOPFMAN, Plaintiff, Respondent and Cross-Appellant,	)	(Super. Ct. No. 300178-1)
v.	)	OPINION
THEODORE F. KOPFMAN, Defendant, Appellant and Cross-Respondent.	)	

APPEAL from a judgment of the Superior Court of Fresno County. Mario Olmos, Judge.

Allen, Cornell, Plgar & Proietti, Dennis A. Cornell and David Cervantes for Plaintiff, Respondent and Cross-Appellant.

Sandell, Young & St. Louis, and Charles A. Wieland for Defendant, Appellant and Cross-Respondent.

-ooOoo-

Theodore F. Kopfman (hereinafter Husband) and Margie Kopfman (hereafter Wife) were married on September 19, 1953. Approximately 26 years later Wife petitioned for dissolution of their marriage. The petition listed as a community asset, inter alia, "U.S. Navy Retirement Benefits." An interlocutory judgment was entered on November 5, 1981, in which the parties stipulated to the division of the community property with the exception of the retirement benefits. The final judgment, which incorporated the stipulated interlocutory judgment, was entered

on November 6, 1981. Neither the interlocutory judgment nor the final judgment mentioned the military retirement/disability benefits.

Prior to entering into the stipulated interlocutory judgment, the parties were aware that the issue of the state's right to divide military retirement on dissolution of marriage was pending before the United States Supreme Court in McCarty v. McCarty (1981) 453 U.S. 210. Wife stated in her deposition that "We agreed on a settlement pending the [S]upreme [C]ourt decision." She further testified:

> "Whether they [United States Supreme Court] were going to decide -- the issue was the retirement pay, and there was -- the [S]upreme [C]ourt that summer was to hand down a decision concerning retirement pay. And we were -- we settled the money matters at that conference and were going to wait and see what the decision was. If it was -- simply put -- basically against me, we were going ahead with what was agreed upon at that meeting you were talking about. If not, we were going to go back into negotiation."

On August 25, 1983, Wife filed a complaint

seeking a community property interest in Husband's as longevity retirement benefits, but that Husband was entitled to an equitable set-off for the money that he had paid to Wife as spousal support pursuant to the stipulated interlocutory judgment. Timely notices of appeal and cross-appeal were filed.

Husband's period of continuous U.S. Naval service prior to marriage was from February 19, 1951, to September 19, 1953. After his marriage in 1953, he continued to serve in the Navy until his retirement on November 1, 1978. On March 19, 1985, pursuant to Husband's request, Husband's records were changed to reflect the following: (2) Husband was placed on temporary disability retired list effective November 1, 1978, by reason of his unfitness because of physical disability ratable at 20 percent; and (2) Husband was placed on the retired list by reason of permanent physical disability ratable at 80 percent effective November 1, 1980. Husband was retired

pursuant to 10 United States Code section 1210, chapter 61.

THE TRIAL COURT'S DETERMINATION THAT WIFE WAS ENTITLED TO RELIEF UNDER HENN V. HENN

Prior to the United State Supreme Court's decision in McCarty v. McCarty, supra, 453 U.S. 210, it was well-settled in California that vested military pensions were community property. (Casas v. Thompson (1986) 42 Cal.3d 131, 139.) "Hoewver, in McCarty v. McCarty, . . . , the United States Supreme Court held the federal legislative scheme authorizing military pensions impliedly preempted state community property law and prohibited the division of military retirement pay." (Casas, supra, at p. 139.)

> "'Congress responded [to McCarty] with the Federal Uniformed Services Former Spouses' Protection Act (FSUFSPA), effective February 1, 1983. (10 U.S.C. § 1408.) It provides that "a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as

property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. § 1408 (c)(1).) FUSFSPA explicitly authorizes a state to apply its marital property laws to retirement benefits payable after June 26, 1981, and before its effective date.

".....

"'It is unmistakable that FUSFSPA is meant to remove (with exceptions not pertinent here) the federal preemption discerned in McCarty as of the date of McCarty's promulgation. When a federal statute overrides a state statute under the supremacy clause "the repeal of the federal statute reinstates or revives the state law without an express reenactment by the state legislature." (Fn. omitted.) (1A Sutherland, Statutory Construction (4th ed. 1985 rev.) § 23.21, p. 390; see, e.g., Boedefeld v. Reed (1880) 55 Cal. 299.) "The result is the same regardless of whether the federal statute is repealed or its repealing effects on state law are expressly rescinded by other congressional action." (1A Sutherland, supra, p. 392, fn. 9 and cases cited therein.) Accordingly, under FUSFSPA the application of California's community property law was revived and became operative on June 26, 1981.

"'However, the California law of finality of judgments operated to insulate the application of the community property laws to cases which became final by virtue of judgments and stipulations

consummated during the period between McCarty and FUSFSPA. [Citations.] To redress this anomaly the Legislature enacted section 5124. It provides that "[c]ommunity property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981, and as it has existed since February 1, 1983." [Citation.]

"'This change in the law of finality of judgments is within the power of the Legislature, subject to the constrains of the federal and state constitutions. FUSFSPA removed the statutory bar of federal preemption to the exercise of California's power to adopt section 5124 . . . .' [Citation.]" (In re Marriage of Barnes (1987) 43 Cal.3d 1371, 1376-1377.)

Civil Code [1/] section 5124 further provided in pertinent part:

"(c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986.

"(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed unless a later enacted statute which is chaptered before that date deletes or extends that date."

Husband argues section 5124 is inapplicable to the present case. The action here was filed prior to enactment of section 5124. Although the action was pending while section 5124 was in effect, Wife failed to amend her complaint to bring to within the purview of that section. Because the section was repealed effective January 1, 1986, Husband argues Wife may not now amend her pleading to state a claim of relief on that section. Husband concedes that Wife's reliance on Henn v. Henn, supra, 26 Cal.3d 323, renders a section 5124 motion unnecessary. However, he argues the action may not properly be classified as a Henn "missed asset" case.

Henn involved a dissolution proceedings in which neither the pleadings nor the judgment made mention of the husband's federal military

---

1/ All statutory references are to the Civil Code unless otherwise indicated.

retirement pension. The wife subsequently filed an action to determine whether husband's military pension was partially community property, and if so, to divide it as community property. The Supreme Court rejected husband's argument that the action was barred by principles of res judicata or collateral estoppel and held wife could bring a subsequent action to adjudicate her rights in the pension subject to equitable limitations. (Henn, supra, at pp. 332-333.) The court stated:

> "Under California law, a spouse's entitlement to a share of the community property arises at the time that the property is acquired. [Citations.] That interest is not altered except by judicial decree or an agreement between the parties. Hence 'under settled principles of California community property law, "property which is not mentioned in the pleadings as community property is left unadjudicated by decree of divorce, and is subject to future litigation, the parties being tenants in common meanwhile."' [Citations.]" (Id. at p. 330, emphasis added.)

Husband argues Henn is distinguishable and thus not controlling. He concedes Wife's interest

was not altered on the face of the agreement. However, unlike Henn, he argues here the parties reached an agreement under which the characterization of the pension as either separate or community property would be determined exclusively by the court's decision in McCarty.

Apparently raising a challenge to the sufficiency of the evidence, Husband argues the trial court erred in concluding the parties had not entered into an agreement under which their respective rights in the pension would be determined exclusively by the Supreme Court's decision in McCarty. The principles governing review in this context are well-settled. A "reviewing court is without power to substitute its deductions for those of the trial court." (Crawford v. Southern Pacific Co (1935) 3 Cal.3d 427, 429.) The reviewing court does not reweigh the evidence, "but rather determine[s] whether, after resolving all conflicts favorably to the prevailing party [citations], and according

prevailing parties the benefit of all reasonable inferences [citations], there is substantial evidence to support the judgment." (Hasson v. Ford Motor Co. (1977) 19 Cal.3d 530, 544.) Application of these principles in the present case demonstrates the trial court's finding that the parties had not entered into an agreement to be bound exclusively by McCarty is supported by the evidence.

Relying in part on In re Marriage of Doud (1986) 181 Cal.App.3d 510, the trial court concluded the parties had not entered into an agreement that would remove the case from Henn consideration. Husband argues the trial court's reliance on Doud is misplaced. However, despite any misinterpretation of Doud, the trial court's construction of the agreement is supported by this court's opinion in In re Marriage of Stephens (1986) 184 Cal.App.3d 616. In Stephens, we concluded the parties were not bound by the McCarty decision. There, the marriage settlement

agreement filed by the parties provided in relevant part as follows:

> "'At the time of execution of this agreement, husband and wife agree that the United States Supreme Court in re Marriage of McCarty . . . is reviewing the issue of military retired pay and states' rights to divide such pay upon dissolution of marriage. Husband and wife agree that the Stanislaus County Superior Court shall retain jurisdiction of the issue of divisibility of such military pay in the event that the United States Supreme Court decides that California Courts may Order a division of such military pay.
>
> "'If the United States Supreme Court decides that such military pay may be Ordered divided by a State Court of competent jurisdiction, then husband agrees to execute and deliver all necessary papers and documents to the appropriate veterans retirement agency or department in order to allow wife to share in such payment benefits . . . :'
>
> "....
>
> "'If wife shall become entitled to receive a portion of husband's military retirement pay as hereinabove set forth, wife agrees to reduce spousal support as set forth hereinabove, or otherwise ordered by an equal amount of such shared military retirement pay.
>
> "'If the United States Supreme Court decides that such military retirement

> pay is not divisible, then wife agrees she shall not be entitled to share in such retir[e]ment pay.'" (Id. at p. 618-619.)

The issue as phrased by the court was "whether . . . the parties have bound themselves to a ruling of the United States Supreme Court which for most purposes does not exist." (Stephens, supra, 184 Cal.App.3d at p. 621.) The court stated:

> "It appears the parties, by entering into the property settlement agreement, intended to avoid further litigation regarding community property interests, if any, in Husband's military retirement and agreed to be bound by the United States Supreme Court's determination of the issue. However, it also appears from the parties' agreement they did not intend to be bound by a particular decision, such as McCarty, but rather to be bound by the state of law as reflected after resolution of the question presented in McCarty. In other words, the parties realized the question of community property interest in the military retirement benefits was in a state of flux and agreed to be bound by the ultimate resolution of that issue. To ignore the passage of FUSFSPA and subsequent decisions of California courts on this issue would be unfair and inequitable." (Id. at pp. 621-622.)

Similary here, it would be inequitable to conclude the parties agreed to be bound by a ruling "which for most purposes did not exist." (Ibid.) As in Stephens, a reasonable interpretation of the "agreement" reached by the parties was an agreement to be bound, not by McCarty but rather, by the "ultimate resolution" of the issue. Moreover, unlike Stephens where the agreement was expressly set forth in writing, here the "agreement" was oral and somewhat ambiguous. Because Wife's deposition testimony is reasonably susceptible to an interpretation that the parties did not agree to be bound by McCarty, we cannot say as a matter of law that the trial court erred in so holding. The "agreement," therefore, did not constitute a specific resolution of a property interest excluding that property interest from subsequent adjudication in a Henn action.

"Henn authorizes an independent action to partition omitted pensions only if the nonemployee spouse had a divisible interest in the asset at the

time of the original decree." (Casas v. Thompson, supra, 42 Cal.3d 131, 141.) Husband argues Wife was not entitled to relief under Henn because at the time judgment was entered she had no community property interest in the pension. He asserts that under McCarty, which was decided prior to entry of judgment in the present case, military retirement benefits "were the military spouse's separate property under the federal military retirement scheme and could not be treated as community property under state law. [Citation.]" (In re Marriage of Barnes (1987) 43 Cal.3d 1371, 1374.)[2/]

His argument ignores FUSFSPA, which was intended to and did overrule McCarty making it

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2/ The Fourth District Court of Appeal held that McCarty did not "change the character of military retirement benefits from community to separate property." (In re Marriage of Floweree (1987) 195 Cal.App.3d 1438, 1442.) Rather, McCarty merely rendered such benefits community property not susceptible to division. (Ibid.) Review was granted in Floweree and the case was transferred in light of Barnes, supra.

"disappear--prospectively, presently and retroactively." (Aloy v. Mash (1985) 38 Cal.3d 413, 421.) "Accordingly, under FUSFSPA, the application of California's community property law was revived and became operative on June 26, 1981." (Barnes, supra, at p. 1377.) As of June 26, 1981, vested military pensions were considered community property in California. (Casas, supra, at p. 139.) Thus, at the time judgment was entered in the present case, Wife had a community property interest in Husband's pension.

Moreover, application of FUSFSPA in the present case is not barred by the law of finality of judgments. In Barnes the court noted that although FUSFSPA was clearly intended to apply retroactively, "the California law of finality of judgments operated to insulate the application of the community property laws to cases which became final by virtue of judgments and stipulations consummated during the period

between McCarty and FUSFSPA." (Barnes, supra, at p. 1378.) However, in the present case Husband's pension was not before the court at the time of judgment and Wife's interest therein was not altered by the decree. Wife now brings an independent action to partition the pension and does not seek to modify or reopen the prior judgment.

Accordingly, we conclude Wife was entitled to relief under Henn. As such, Wife's failure to rely on section 5124 is irrelevant.

CLASSIFICATION OF MILITARY RETIREMENT BENEFITS

Husband argues his military retirement pay cannot be divided because, under federal law, it constitutes reduced current pay for reduced current services. This same argument was rejected by our Supreme Court in Casas v. Thompson, supra, 42 Cal.3d 131.

> "On a similar note, Max also asserts that division of his military retirement pay is prohibited, because it is reduced

compensation for reduced current services and, to the extent earned after his separation from Virginia, is not community property. However, in In re Marriage of Fithian, supra, 10 Cal.3d at page 604, we held 'military retirement pay must be realistically viewed as compensation for past, not present, services.' The Supreme Court in McCarty did not overrule Fithian's characterization of military retired pay as deferred compensation. (See McCarty v. McCarty, supra, 453 U.S. at p. 223 . . . .)" (Id. at p. 142, fn. 5.)

Relying on 10 United States Code (hereafter U.S.C.) section 1408(a)(4), as originally enacted,[3/] Husband argues that California courts may not classify or divide more than the "disposable" pay. Because payments under chapter 61 of title 10 are specifically excluded

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3/ 10 U.S.C. section 1408(a)(4) originally provided: "'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which --[¶] (A) are owed by that member to the United States;[¶] (B) are required by law to be and are deducted from the retired or retainer pay of such

(Footnote cont'd)

from the definition of "disposable retired pay," he argues FUSFSPA precludes application of

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(Footnote 3 contd.)

member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38; [¶] (C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled; [¶] (D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such presents evidence of a tax obligation which supports such withholding; [¶] (E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or [¶] (F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section." (Emphasis added.)

However, the section was amended pursuant to Public Law 99-661, § 664 (a)(1), striking out the above underscored language and adding: "(E) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); . . . "

community property laws to these benefits.

Prior to the California Supreme Court's holding in Casas v. Thompson, supra, 42 Cal.3d 131, there was a split in authority in the Court of Appeal on this issue. In In re Marriage of Costo (1984) 156 Cal.App.3d 781, the court, relying on U.S.C. section 1408(3)(1) and (a)(4), concluded trial courts lacked jurisdiction over that portion of compensation pay the former serviceperson received as a result of electing to waive retirement in order to receive disability benefits. (Id. at pp. 782, 786.) In reaching its conclusion, the court disagreed with In re Marriage of Cullen (1983) 145 Cal.App.3d 424 and In re Marriage of Stenquist (1983) 145 Cal.App.3d 430, both of which involved disability payments under 10 U.S.C., chapter 61. (In re Marriage of Costo, supra, 156 Cal.App.3d at p. 787, fns. 9, 11.)

However, the Costo holding was disapproved by our Supreme Court in Casas v. Thompson,

supra, 42 Cal.3d at p. 144. Casas expressly rejects the argument that under FUSFSPA, California courts can only award a community property interest in the disposable pay. The court concluded:

> "[C]onsidering its intent and operation, we find FUSFSPA is not inconsistent with a division of gross, rather than disposable, military retired pay. FUSFSPA's intended limitations reach only restrictions on the garnishment of and direct payment from the retiree's disposable pay. Characterization of retirement pay remains a state law question. Thus, in California the military retiree's gross pay is a community asset subject to equal division." (Id. at p. 151, fn. omitted.)

Husband argues Casas was incorrectly decided. However, the merits of his contention need not be addressed as this court is compelled to follow Casas. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450.)

Finally, Husband argues application of FUSFSPA in his case violates due process and impairs contractual obligations. His argument is

unavailing in light of Barnes. There, our Supreme Court concluded that application of section 5124 was neither unconstitutional as a violation of due process (id. at p. 1377) nor as a violation of constitutional prohibitions against impairment of contracts. (Id. at p. 1378.) Obviously, section 5124 only succeeds by virtue of the implied constitutionality of FUSFSPA. Husband's constitutional challenge to application of FUSFSPA fails.

THE CROSS-APPEAL

In her cross-appeal, Wife argues the trial court erred in failing to award her a community property interest in the gross retirement pay and in failing to make the award retroactive to either the filing of the underlying action (Aug. 25, 1983) or alternatively the date of the filing of the demurrer (Oct. 19, 1983). The contentions are without merit in that Husband has agreed to "stipulate to its retroactive application as of the date of the demurrer, October 19, 1983, with the

understanding that he is entitled to an equitable offset for all spousal support monies paid by him to respondent from October 1, 1983, forward." Husband also agrees to stipulate that "the record should reflect a community property award in gross military benefits received as longevity pay and in lieu of longevity pay."

Wife further argues the trial court's decision is not specific as to the set-off amount and contends the matter should be remanded for a determination as to the appropriateness of a set-off for spousal support.

Contrary to Wife's assertion, the trial court specifically stated:

> "Having concluded that plaintiff has a community property interest in the gross military disability that would have been paid to defendant as longevity retirement benefits, the focus now shifts to whether such award should be given full retroactive effect. Under the circumstances of the present case, as reflected by the record provided to the Court, it would appear inequitable to force defendant to compensate plaintiff for her past community share after he has paid $750.00 monthly spousal

> support payments per the stipulated interlocutory judgment of dissolution of marriage."

Moreover, prior to entering judgment, the court provided the parties an opportunity to be heard on this point. Wife apparently did not take advantage of this opportunity. The trial court has authority to apply equitable principles in determining

> "whether to enforce by restitution a spouse's community property interest in pension payments received by the retiree spouse before partition and to what degree. [Citation.] Where the court finds no unjust result in awarding full retroactive benefits, the court may 'tailor the form of that award' to avoid placing an undue burden on the spouse ordered to pay." (Casas, supra, 42 Cal.3d at p. 152.)

In the present case, the trial court found it would be unfair to require Husband to compensate Wife for her past community property share because of the payment of spousal support. The trial court also provided the parties an opportunity to be heard on this point. Wife failed to take advantage of this opportunity.

Based on the foregoing, we conclude the trial court properly allowed a set-off for prior spousal support.

Finally, Wife argues the judgment should be modified to indicate that the previously adjudicated community property may not be reopened. However, a Henn action does not operate to reopen a final judgment and Husband has not attempted to reopen the judgment. Thus, an amendment appears unnecessary.

SANCTIONS FOR A FRIVOLOUS APPEAL

Wife requests we impose sanctions on Husband for taking a frivolous appeal. She argues the appeal constitutes an attempt to delay payment under the judgment, is filed for purposes of harassment and vindictiveness, and is without merit. Wife's request for sanctions is meritless.

In re Flaherty (1982) 31 Cal.3d 637 sets forth two general standards for evaluation of such claims. First, the "subjective standard looks to

the motives of the appellant and his or her counsel." (Id. at p. 649.) Second, "[t]he objective standard looks at the merits of the appeal from a reasonable person's perspective." (Ibid.)

In the present case, Husband raises a cognizable challenge to the trial court's ruling that Wife is entitled to relief under Henn. That such a challenge is unsuccessful does not render it meritless. Moreover, although the issues raised regarding the retirement benefits have been resolved contrary to Husband's position by the California courts, the United States Supreme Court has yet to issue its definitive ruling. Thus, Wife's request for sanctions is denied.

The judgment is affirmed. Costs to respondent.

ARDAIZ
J.

WE CONCUR:

WOLPERT
Acting P.J.

STONE
J.

APPENDIX F

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

5th District, No. F008411

S007349

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Supreme Court
Filed
Nov 9, 1988
Clerk
Deputy

IN RE MARRIAGE OF KAPFMAN
MARGIE KAPFMAN
v.
THOEDORE KAPFMAN

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX G

TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS

TITLE 10 U.S.C.

§1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means -

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28)

having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree). which -

(A) is issued in accordance with the laws of the jurisdiction of the

court;

(B) provides for -

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)));

or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former

spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals, under the laws applicable to such appeals or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which -

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal

employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1594 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which support such withholding;

(E) in the case of a member entitled to retired pay under chapter 61 of

this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on

or before that date of a court order, was married to that member.

(b) For the purposes of this section -

(1) service of a court order is effective if-

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt is requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identifying the member concerned and include, if possible, the social security numbers of such member;

and

(D) the court order of other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) were observed; and

(2) a court order is a regular on its face if the order -

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely

of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title or interest which can be sold, assigned or transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his

residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments 9subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division

of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired

or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the

member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective

service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired or retainer pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which

remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall -

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by and such conflicting court order, but not more than the amount of disposable retired, or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of -

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that

member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus -

(I) the amount of disposable retired or retainer pay paid

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the

Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the

Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the

payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid any under section 459 of the Social Security Act (42 U.S.C. 659) in any case which the maximum amount permitted under subparagraph (B) of paragraph (4) has been

paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as

possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at this last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

APPENDIX H

TEXTS OF CONSTITUTION AND STATUTORY PROVISIONS

TITLE 38 U.S.C.

§3105. Waiver of retired pay

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much

of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.

APPENDIX I

32 CFR Ch. 1 (7-1-87 Edition)

PART 63 - FORMER SPOUSE PAYMENTS FROM RETIRED PAY

Sec.

63.1 Purpose

63.2 Applicability and scope.

63.3 Definitions.

63.4 Policy.

63.5 Responsibilities.

63.6 Procedures.

AUTHORITY: 10 U.S.C. 1408

SOURCE: 50 FR 2667, Jan. 18, 1985, unless otherwise noted.

§63.1 Purpose.

Under 10 U.S.C. 1408, this part establishes policy and authorizes direct payments to a former spouse of a member from retired pay in response

to court-ordered alimony, child support, or division of property.

§63.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments, the Coast Guard (under agreement with the Department of Transportation), the Public Health Service (PHS) (under agreement with the Department of Health and Human Services); and the National Oceanic and Atmospheric Administration (NOAA) (under agreement with the Department of Commerce). The term "Uniformed Services," as used herein, refers to the Army, Navy, Air Force, Marine Corps, Coast Guard, commissioned corps of the PHS, and the commissioned corps of the NOAA.

(b) This part covers members retired from the active and reserve components of the Uniformed Services who are subject to court orders awarding alimony, child support, or

division of property.

§63.3 Definitions.

(a) Alimony. Periodic payments for the support and maintenance of a spouse or former spouse in accordance with State law under 42 U.S.C. 662(c). It includes, but is not limited to, spousal support, separate maintenance, and maintenance. Alimony does not include any payment for the division of property.

(b) Annuitant. A person receiving a monthly payment under a survivor benefit plan related to retired pay.

(c) Child support. Periodic payments for the support and maintenance of a child or children, subject to and in accordance with State law under 42 U.S.C. 662(b). It includes, but is not limited to, payments to provide for health care, education, recreation, and clothing or to meet other specific needs of such a child or children.

(d) Court. Any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands and any court of the United States as defined in 28 U.S.C. 451 having competent jurisdiction; or any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(e) Court Order. As defined under 10 U.S.C. 1408(a)(2), a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree. It includes a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property

settlement incident to such previously issued decree. The court order must provide for the payment to a member's former spouse of alimony, child support, or a division of property. In the case of a division of property, the court order must specify that the payment is to be made from the member's disposable retired pay.

(f) Creditable service. Service counted towards the establishment of any entitlement for retired pay. See paragraphs 10102 through 10108 of DoD 1340.12-M, 42 U.S.C. 212 for the PHS and 33 U.S.C. 864 and 10 U.S.C. 6323 for NOAA.

(g) Designated agent. A representative of a Uniformed Service who will receive and process court orders under this part.

(h) Division of property. Any transfer of property or its value by an individual to his or her former spouse in compliance with any community property settlement, equitable distribution of property, or other distribution of property between spouses or former spouses.

(i) Entitlement. The legal right of a member to receive retired pay.

(j) Final decree. As defined under 10 U.S.C. 1408(a)(3), a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(k) Former spouse. The former husband or former wife, or the husband or wife, of a member.

(l) Garnishment. The legal procedure through which payment is made from an individual's pay that is due or payable to another party inorder to satisfy a legal obligation to provide child support, to make alimony payments, or both, under 5 CFR Part 581 and 42 U.S.C. 659 or to enforce a division of property other than a division of retired pay as property under

10 U.S.C. 1408(d)(5).

(m) Member. A person originally appointed or enlisted in, or conscripted into, a Uniformed Service who has retired from the regular or reserve component of the Uniformed Service concerned.

(n) Renounced pay. Retired pay to which a member has an entitlement, but for which receipt of payment has been waived by the member.

(o) Retired pay. The gross entitlement due a member based on conditions of the retirement law, pay grade, years of service for basic pay, years of service for percentage multiplier, if applicable, and date of retirement (transfer to the Fleet Reserve or Fleet Marine Corps Reserve); also known as retainer pay. It does not include benefits paid to a member retired for disability under 10 U.S.C. Chapter 61.

§63.4 Policy.

It is the policy of the Uniformed Services to honor a former spouse's request for direct payment from a given member's retired pay in enforcement of a court order that provides for a alimony, child support, or division of property, when the terms, conditions, and requirements in this part are satisfied.

§63.5 Responsibilities.

(a) The Assistant Secretary of Defense (Comptroller) shall establish policy and procedures, provide guidance, coordinate changes with the Uniformed Services, and monitor the implementation of this part within the Department of Defense.

(b) The Secretaries of the Military Departments and Heads of the other Uniformed Services shall implement this part.

§63.6 Procedures.

(a) Eligibility of former spouse. (1) A former spouse of a member is eligible to receive direct payment from the retired pay of that member only pursuant to a court order that satisfies the requirements and conditions specified in this part. In the case of a division of property, the court order must specifically provide that payment is to be made from disposable retired pay.

(2) For establishing eligibility for direct payment under a court order that provides for a division of retired pay as property, a former spouse must have been married to the member for 10 years or more, during which the member performed 10 years or more of creditable service. There is no 10-year marriage requirement for payment of child support, alimony, or both.

(b) Application by former spouse. (1) A former spouse shall deliver to the designated agent of the member's Uniformed Service a signed

DD Form 2293, Request for Former Spouse Payments from Retired Pay, or a signed statement that includes:

(i) Notice to make direct payment to the former spouse from the member's retired pay.

(ii) A copy of the court order and other accompanying documents certified by an official of the issuing court that provides for payment of child support, alimony, or division of property.

(iii) A statement that the court order has not been amended, superseded, or set aside.

(iv) Sufficient identifying information about the member to enable processing of the application. The identification should give the member's full name, social security number, and Uniformed Service.

(v) The full name, address, and social security number of the former spouse.

(vi) Before payment, the former spouse shall agree personally that any future overpayments are recoverable and subject to involuntary

collection from the former spouse or his or her estate.

(vii) As a condition precedent to payment, the former spouse shall agree personally to notify the designated agent promptly if the operative court order upon which payment is based is vacated, modified, or set aside. This shall include notice of the former spouse's remarriage if all or a part of the payment is for alimony or notice of a change in eligibility for child support payments under circumstances of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payment to a former spouse from retired pay.

(2) If the court order is for a division of retired pay as property and it does not state that the former spouse satisfied the eligibility criteria found in paragraph (a)(2) of this section, the former spouse shall furnish sufficient evidence for the designated agent to verify that the

requirement was met.

(3) The notification of the designated agent shall be accomplished by certified or registered mail, return receipt requested, or by personal service. Effective service is not accomplished until a complete application providing all information required by this part is received in the office of the designated agent, who shall note the date and time of receipt on the notification document.

(4) Not later than 90 days after effective service, the designated agent shall respond to the former spouse as follows: (i) If the court order will be honored, the former spouse shall be informed of the date that payments tentatively begin; the amount of each payment; the amount of gross retired pay, total deductions, and disposable retired pay (except in cases where full payment of a court-ordered fixed amount will be made); and other relevant information if applicable: or (ii) If the court order will not be

honored, the designated agent shall explain in writing to the former spouse why the court order was not honored.

(5) The designated agent for each Uniformed Service is:

(i) Army: Commander, Army Finance and Accounting Center, Attn: FINCL-G, Indianapolis, IN 46249, (317) 542-2155.

(ii) Navy: Director, Navy Family Allowance Activity, Anthony J. Celebrezze Federal Building, Cleveland, OH 44199, (216) 522-5301.

(iii) Air Force: Commander, Air Force Accounting and Finance Center, ATTN: JA, Denver, CO 80279, (303) 370-7524.

(iv) Marine Corps: Commanding Officer, Marine Corps Finance Center (Code AA), Kansas City, MO 64197, (816) 926-7103.

(v) Coast Guard: Commandant (G-LGL), General Law Division, United States Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593, (202) 426-1553.

(vi) Public Health Service: Office of General Counsel, Department of Health and Human Services, Room 722A, Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201, (202) 245-7741.

(vii) National Oceanic and Atmospheric Administration: Director, Navy Family Allowance Activity, Anthony J. Celebrezze Federal Building, Cleveland, OH 44199, (216) 522-5301.

(6) U.S. Attorneys are not designated agents authorized to receive court orders or garnishments under this part.

(c) Review of Court Orders. (1) The court order must be regular on its face, meaning that it is issued by a court of competent jurisdiction in accordance with the laws of the jurisdiction.

(2) The court order must be legal in form and must include nothing on its face that provides reasonable notice that it is issued without authority of law. It is required that the court order be authenticated or certified within 90

days immediately preceding its service on the designated agent.

(3) The court order must be a final decree.

(4) If the court order was issued while the member was on active duty and the member was not represented in court, the court order or other court documents must certify that the rights of the member under the "Soldiers' and Sailors' Civil Relief Act of 1940" (50 U.S.C. Appendix 501-591) were complied with.

(5) Sufficient information must be contained in the court order to identify the member.

(6) For court orders that provide for the division of retired pay as property, the following conditions apply:

(i) The court must have jurisdiction over the member by reasons of (A) the member's residence, other than because of military assignment in the territorial jurisdiction of the court; (B) the member's domicile in the territorial jurisdiction of the court; or (C) the member's

consent to the jurisdiction of the court.

(ii) The treatment of retired pay as property solely of the member or as property of the member and the former spouse of that member must be in accordance with the law of the jurisdiction of such court.

(iii) The court order or other accompanying documents served with the court order must show the former spouse was married to the member 10 years or more, during which the member performed at least 10 years of creditable service.

(7) Court orders awarding a division of retired pay as property that were honored if they otherwise satisfy the requirements and conditions specified in this part. A modification on or after June 26, 1981, of a court order that originally awarded a division of retired pay as property before June 26, 1981, may be honored for subsequent court-ordered changes made for clarification, such as the interpretation of a computation formula in the original court order.

For court orders issued before June 26, 1981, subsequent amendments after that date to provide for a division of retired pay as property are unenforceable under this part. If the court order awarding a division of retired pay as property is issued on or after June 26, 1981, subsequent modifications of that court order shall be honored if they otherwise satisfy the requirements and conditions specified in this part.

(8) In this case of a division of property, the court order must provide specifically for payment of a fixed amount expressed in U.S. dollars or payment as a percentage or fraction of disposable retired pay. Court orders specifying a percentage or fraction of retired pay shall be construed as a percentage or fraction of disposable retired pay. A court order that provides for a division of retired pay by means of a formula wherein the elements of the formula are not specifically set forth or readily apparent on

the face of the court order will not be honored unless clarified by the court.

(d) Garnishment Orders. (1) If a court order provides for the division of property other than retired pay in addition to an amount of disposable retired pay to be paid to the member's former spouse, the former spouse may garnish that member's retired pay in order to enforce the division of property. The limitations of 15 U.S.C. 1673(a)and the limitations of §63.6(e) of this part apply in determining the amount payable to a former spouse.

(2) The designated agents authorized to receive service of process of garnishment orders under this part shall be those listed in § 63.6(b)(5) of this part.

(3) Garnishment orders under this part for enforcement of a division of property other than retired pay shall be processed in accordance with 5 CFR Part 581 to the extent that the procedures are consistent with this part.

(e) Limitations. Upon proper service, a member's retired pay may be paid directly to a former spouse in the amount necessary to comply with the court order, provided the total amount paid does not exceed:

(i) 50 percent of the disposable retired pay for all court orders and garnishment actions paid under this part.

(ii) 65 percent of the disposable retired pay for all court orders and garnishments paid under this part and garnishments under 42 U.S.C. 659.

(2) Disposable retired pay is the gross pay entitlement, including renounced pay, less authorized reductions. Disposable retired pay does not include the retired pay of a member retired for disability under 10 U.S.C. Chapter 61 or annuitant payments under 10 U.S.C. Chapter 73. The authorized deductions are:

(i) Amounts owed to the United States.

(ii) Fines and forfeitures ordered by a court-martial.

(iii) Amounts waived in order to receive compensation under title 5 or 38 of United States Code.

(iv) Federal employment taxes and income taxes withheld to the extent that the amount deducted is consistent with the member's tax liability, including amounts for supplemental withholding under 26 U.S.C. 3402(i), when the member presents evidence to the satisfaction of the designated agent that supports such withholding. State employment taxes and income taxes when the member makes a voluntary request for such withholding from retired pay and the Uniformed Services have entered into an agreement with the State concerned for withholding from retired pay.

(v) Premiums paid as a result of a election under 10 U.S.C. Chapter 73 to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order

under this part.

(vi) Other amounts required by law to be deducted.

(f) Notification of Member. (1) As soon as possible, but not later than 30 calendar days after effective service of a court order or garnishment action under this part, the designated agent shall send written notice to the affected member at his or her last known address.

(2) This notice shall include:

(i) A copy of the court order and accompanying documentation.

(ii) An explanation of the limitations placed on the direct payment to a former spouse from a member's retired pay.

(iii) A request that the member submit notification to the designated agent if the court order has been amended, superseded, or set aside. The member is obligated to provide an authenticated or certified copy of the operative

court documents when there are conflicting court orders.

(iv) The amount or percentage that will be deducted if the member fails to respond to the notification as prescribed by this part.

(v) The effective date that direct payments to the former spouse tentatively will begin.

(vi) Notice that the member's failure to respond within 30 days from the date that the notice is mailed may result in the payment of retired pay as provided in the notification.

(vii) That if the member submits information in response to this notification, the member thereby consents to the disclosure of such information to the former spouse or the former spouse's agent.

(3) If the member responds to the notification, the designated agent shall consider the response and will not honor the court order whenever it is shown that the court order is defective, or the court order is modified,

superseded, or set aside.

(g) Designated agent liability. (1) The United States and any officer or employee of the United States will not be liable with respect to any payment made from retired pay to any member or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this Part.

(2) An officer or employee of the United States, who under this part has the duty to respond to interrogatories, will not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him or her in carrying out any of the duties that directly or indirectly pertain to answering such interrogatories.

(3) If a court order on its face appears to conform to the laws of the jurisdiction from which it was issued, the designated agent will not be required to ascertain whether the court has

obtained personal jurisdiction over the member.

(4) Whenever a designated agent is effective served with interrogatories concerning implementation of this part, the designated agent shall respond to such interrogatories within 30 calendar days of receipt or within such longer period as may be prescribed by applicable State law.

(h) Payments. (1) Subject to a member's eligibility for retired pay, effective service of a court order, and the limitations and requirements of this part, the Uniformed Service concerned shall begin payments to the former spouse not later than 90 days after the date of effective service.

(2) Payments shall conform with the normal pay and disbursement cycle for retired pay. Payments may be expressed as fixed in amount or as a percentage or fraction of disposable retired pay. With regard to payments based on a percentage or fraction of disposable retired pay,

the amount will change in direct proportion and at the effective date of future cost-of-living adjustments that are authorized, unless the court order directs otherwise.

(3) Payments terminate on the date of the death of the member, death of the former spouse, or as stated in the applicable court order, whichever occurs first. Payments shall be terminated or shall be reduced upon the occurrence of a condition that requires termination or reduction under applicable State law.

(4) When several court orders are served with regard to a member's retired pay, payment shall be satisfied on a first-come, first-served basis within the amount limitations prescribed in paragraph (3) of this section.

(5) If conflicting court orders are served on the designated agent that direct that different amounts be paid during a month to the same former spouse from a given member's retired pay,

the designated agent shall authorize payment on the court order directing payment of the least amount. The difference in amounts on conflicting court orders shall be retained by the designated agent pending resolution by the court that has jurisdiction or by agreement of the parties. The amount retained shall be paid as provided in a subsequent court order or agreement. The total of all payments plus all moneys retained under this paragraph shall be within the limitation prescribed in paragraph (e) of this section.

(6) The designated agent shall comply with a stay of execution issued by a court of competent jurisdiction and shall suspend payment of disputed amounts pending resolution of the issue.

(7) When service is made and the identified member is found not to be currently entitled to payments the designated agent shall advise the former spouse that no payments are due from or payable by the Uniformed Service to the named

individual. If the member is on active duty when service is accomplished, the designated agent shall retain the application until the member's retirement. In such case, payments to the former spouse, if otherwise proper, shall begin not later than 90 days from the date the member first becomes entitled to receive retired pay. If the member becomes entitled to receive retired pay more than 90 days after first being notified under paragraph (f) of this section, the notification procedures prescribed by that section shall be repeated by the designated agent.

(8) In moneys are only temporarily exhausted or otherwise unavailable, the former spouse shall be fully advised of the reason or reasons why and for how long the moneys will be unavailable. Service shall be retained by the designated agent and payments to the former spouse, if otherwise proper, shall begin not later than 90 days from the date the member becomes entitled to receive retired pay. If the member

becomes entitled to receive retired pay more than 90 days after first being notified under paragraph (f) of this section, the notification procedures prescribed by that section shall be repeated by the designated agent.

(9) The order of precedence for disbursement of retired pay when the gross amount is not sufficient to permit all authorized deductions and collections shall follow Volume I, Part 3, Section 7040, "Order of Payment," in the Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies. Court-ordered payments to a former spouse from retired pay shall be enforced over voluntary deductions and allotments.

(10) Payments made shall be prospective in terms of the amount stated in the court order. Arrearages will not be considered in determining the amount payable from retired pay.

(11) At the request of the designated agent, the former spouse may be required to provide a

certification of eligibility that attests in writing to the former spouse's continued eligibility and that includes a notice of change in status or circumstances that affect eligibility. After notice to the former spouse, payments to the former spouse may be suspended, or terminated, when the former spouse fails to comply, or refuses to comply, with the certification requirement.

(i) Reconsideration. A former spouse or member may request that the designated agent reconsider the designated agent's determination in response to service of an application for payments under this part or the member's answer to the designated agent with respect to notice of such service. For reconsideration, the request must express the issues the former spouse or the member believes were incorrectly resolved by the designated agent. The designated agent shall respond to the request for reconsideration, giving an explanation of the determination reached.

(Approved by the Office of Management and

Budget under control numbers 0704-0160 and 0704-0182)

APPENDIX J

Charles A. Wieland, #109464
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Court of Appeal
Fifth Appellate District
FILED
December 9, 1988
Kevin A. Swanson, Clerk
By_____
Deputy

Attorney for Appellant, THEODORE KOPFMAN

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA IN AND FOR
THE FIFTH APPELLATE DISTRICT

In Re the Marriage of Theodore F. Kopfman and Margie D. Kopfman	
MARGIE D. KOPFMAN, Plaintiff/Respondent, vs. THEODORE F. KOPFMAN, Respondent/Appellant	Civil No. F008411 Fresno Superior Court No 300178-1 NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

NOTICE IS HEREBY GIVEN that THEODORE F. KOPFMAN the Defendant in the state trial court and appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the California Supreme Court denying review of the opinion of the Court of Appeal of the State of California in and for the Fifth Appellate District, entered in this action on November 9, 1988.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraphs 2 and/or 3.

DATED: December 9, 1988

DAVID J. ST. LOUIS, INC.

_____

CHARLES A. WIELAND

SUPREME COURT OF THE UNITED STATES

ATTORNEY APPEARANCE FORM

NO. _____

THEODORE F. KOPFMAN, Appellant

v.

MARGIE D. KOPFMAN, Appellee

The Clerk will enter my appearance as counsel for Theodore F. Kopfman, who in this Court is appellant.

I certify that I am a member of the Bar of the Supreme Court of the United States.

CHARLES A. WIELAND
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CERTIFICATE OF SERVICE

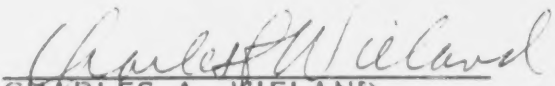
I, CHARLES A. WIELAND, one of the attorneys for appellant, Theodore F. Kopfman, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 23rd day of February, 1989, I served copies of the foregoing corrected jurisdictional statement on the several parties hereto, as follows:

1. The Solicitor General by depositing three copies of the document in a United States mail box, with First Class Postage prepaid, addressed to Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On Margie D. Kopfman, by depositing three copies of the document in a United States mail box, with First Class Postage prepaid, addressed to her counsel of record, Dennis A. Cornell, CORNELL, POLGAR & PROIETTI, 1640

"N" Street, Suite 200, Merced, California 95344.

As a result of the foregoing, all parties required to be served have been served.



CHARLES A. WIELAND
Counsel for appellant